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Court of Appeals
Division III
State of Washington

No. 34599-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JEFF and DONNA ZINK,

Appellants & Cross-Respondents

v.

CITY OF MESA

Respondent/Cross-Appellant.

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT (REVISED)

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I. INTRODUCTION

The Public Records Act ("PRA") is a "good government" statute designed to protect the public's "right to know how their government is spending their tax dollars."[1] Its penalty provision supports this goal by "deter[ring] improper denials of access to public records."[2] A PRA penalty award is sufficient to serve this deterrent goal when it serves as an "adequate incentive to induce future compliance."[3]

Because the taxpayers, not the bad actors, pay these penalties for PRA violations, any penalty award that exceeds the amount necessary to induce future compliance undermines the goals of the PRA by wasting tax dollars without any corresponding public benefit.[4] To ensure that a penalty

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[1] "Open Government Ombudsman Function" by Bob Ferguson, Wash. State Attorney General at http://www.atg.wa.gov/open-government-ombuds-function (last visited May 31, 2016); *see also Mitchell v. State*, 153 Wn. App. 803, 830, 225 P.3d 280 (2009) ("the PRA's stated purpose [is] to keep the governed informed about their government and costs"); *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 661-62, 343 P.3d 370 (2014) ("Disclosure in this instance is in the public's interest because the information involves expenditure of public funds"); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 328, 890 P.2d 544 (1995) ("there exists a reasonable concern by the public that government conduct itself fairly and use public funds responsibly."); *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 223, 951 P.2d 357 (1999) ("records of government agency expenditures ... are of legitimate public interest and therefore not exempt from disclosure"); *Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 690, 13 P.3d 1104 (2000) (same).

[2] *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 462-63, 229 P.3d 735 (2010) ("*Yousoufian 2010*"). While penalties can also serve to compensate for "actual personal economic loss" that is a foreseeable result of an agency's improper withholding of records (*see Yoursoufian 2010*, 168 Wn.2d at 461-52), no such loss is at issue in this case.

[3] *Yousoufian 2010*, 168 Wn. 2d at 462-63

[4] *See Vasbinder v. Scott*, 976 F.2d 118, 121 (2nd Cir. 1992) ("Accordingly, an award [punitive damages] should not be so high as to result in the financial ruin of the defendant. ... even outrageous conduct will not support an oppressive or patently excessive award of damages. Further, ... an award should not be so large as to constitute a windfall to the individual litigant."). Punitive damage awards and statutory penalty awards serve similar purposes.

award is sufficient to serve as an adequate deterrent without wasting taxpayer dollars, the Court must take into account the size of the jurisdiction that has violated the PRA. As the Supreme Court noted in *Yousoufian 2010*, "the penalty needed to deter a small school district and that necessary to deter a large county may not be the same."[5]

Here, the City of Mesa collects approximately $175,000 annually in general fund unrestricted tax revenue from its approximately 500 residents – an average of $350 per resident. Thus, when the trial court came up with a preliminary penalty award of $352,954 (which would have exceeded $700 per resident) the PRA provided the trial court with the discretion to make an across-the-board reduction of that preliminary award to ensure that the PRA penalty award did not cripple the City of Mesa and undermine public confidence in the PRA.

The trial court, however, only reduced the award by a little over 50%, so that the final penalty award still amounted to more than 100% of the City's annual general fund unrestricted tax revenue and was therefore was still grossly excessive in light of the deterrent goals of PRA penalties. By way of comparison, the largest PRA penalty recorded in a reported decision – the penalty in *Wade's Eastside Gun Shop* – only totaled 2.1 % of the agency's general fund budget.[6] If the Supreme Court had imposed a comparable $350-per-resident penalty in *Yousoufian*, the total penalty

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[5] *Yousoufian 2010*, 168 Wn.2d at 463.

[6] *See Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016). The Department of Labor and Industries had a general fund budget of $23,491,000 in 2015. See Laws of 2015, Ch. 5, §1216.

would have exceeded $675 million,[7] which no one would defend as reasonable.[8]

Thus, while the trial court properly ruled that it had the discretion under the *Yousoufian* analysis to make an across-the-board reduction of its preliminary penalty award to ensure the penalty was not crippling and did not undermine the purposes of the PRA, the trial court's 50% reduction was inadequate and still resulted in a grossly disproportionate penalty. Because no court would ever impose a PRA penalty that amounted to $350 per resident of a large jurisdiction like King County, it was an abuse of the trial court's discretion to impose such a massive penalty on the taxpayers of Mesa. This Court should therefore affirm that the trial could had the discretion to make an across-the-board reduction of its preliminary award, but also rule that a further reduction is required so that the ultimate penalty award is not grossly excessive of what is required to deter future violations.

The trial court also properly applied the 2011 amendment to the PRA penalty provision when setting penalties. Finally, the trial court erred when it increased the total penalty award by 1/3 based on an ambiguous letter from the Municipal Research and Service Center (MRSC).

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[7] In 2010, King County's population was 1,931,281, so if that number is multiplied by $350, it totals $675,948,350. See U.S. Census Bureau, "Quick Facts, King Count, Washington" (available at https://www.census.gov/quickfacts/fact/table/kingcountywashington/PST045216))(last visited 6/24/17).

[8] *See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 444, 98 P.3d 463 (2004) ("*Yousoufian 2004*") (Sanders, J., dissenting in part) (suggesting that a penalty that amounted to one percent of the county's operating budget would be an extreme penalty that might be appropriate medicine for extreme violations).

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court abused its discretion when it entered a total penalty award of $175,000 – an amount that exceeded 100% of the City of Mesa's 2015 annual general fund unrestricted tax revenue and amounted to $350 per resident – was appropriate in this case. (Finding of Fact 5.i, Order a.)

2. The trial court erred in ruling that the MRSC memo should have put the City on notice that its redactions in violations 6, 8, 15, 16 and 22 (Finding of Fact 7.b, Conclusions of Law 6, 8, 15, 16, 22; Appendix A pages 6, 8, 15, 16, and 22).

III. ISSUES RELATED TO ADDITIONAL ASSIGNMENTS OF ERROR

Issue Related to Assignment of Error 1:

The ultimate purpose of the PRA is to protect the interests of the taxpayers by giving them a tool to monitor and fight against government waste and misconduct. Does a penalty award based on employee misconduct that that exceeds a full year of the taxes the residents pay further the purposes of the PRA, or should that penalty be reduced so the total penalty award does not exceed 33% of the City's annual general fund unrestricted tax revenue.

Issue Related to Assignment of Error 2:

While the MRSC memo noted that there was no general exemption for contact information, it also expressly identified the exemptions that the City was relying on for its redactions in violations 6, 8, 15, 16 and 22. Does

the factual record support the trial court's finding that the MRSC memo was sufficient to put the City on notice that its redactions of addresses was erroneous?

By increasing the daily penalties by 300% for these five violations based on the MRSC memo, the trial court increased its total penalty award by 1/3. Was that large increase based on the MRSC memo an abuse of discretion?

IV. STATEMENT OF THE CASE

This is the third appeal in this case, and the two prior decisions from this Court provide significant details about the background facts. *See Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007) ("*Zink I*"); *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011) ("*Zink II*").

Because the City has previously conceded to the 33 violations[9] of the PRA at issue in the second appeal and this third appeal primarily involves questions of law related to the trial court's discretion in setting PRA penalties, a summary of the facts related to each violation is unnecessary. The Court can assume that this case involves 33 violations of the PRA, several of which were egregious and deserve to be harshly punished. The ultimate issue in this appeal is about how much should the taxpayers be punished for the mistakes of their public servants.

[9] While the Zinks and the City have disputed whether there were 29 or 33 violations, the City are not challenging the trial court's decision to find 33 violations in this appeal. The dispute arose because for several requests, the trial court originally found two separate violations. It is thus accurate to say there were 33 violations involving 29 separate requests. References to violation numbers in the City's trial court pleadings, however, will use different violation numbers.

Thus, only a brief overview will be provided in this statement that focus primarily on procedural facts and background facts about the City of Mesa.

A. Facts about the City of Mesa

Mesa has a total population of approximately 500.[10] In 2015, it collected $172,825 in general fund unrestricted tax revenues and expected to collect a similar sum in 2016.[11] The $175,000 penalty award at issue thus exceeds 100% of the general fund tax revenue the residents of Mesa pay in a single year, and totals over $350 per resident.

Since this dispute arose, the Mesa City Clerk and City Council have received training on PRA compliance and reformed how the City processes PRA requests.[12] The pending lawsuit represents the only time the City has been sued for violating the PRA.[13]

B. Penalties Rates Imposed

Attached as Appendix A to this brief is the trial court's spreadsheet that contains the trial court's preliminary penalty rates for each violation. The trial court ultimately reduced its preliminary award from $352,954 to

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[10] See Wikipedia, "Mesa, Washington" (available at https://en.wikipedia.org/wiki/Mesa,_Washington) (last visited 6/24.17) (citing census statistics).

[11] Clerk's Papers 2 ("CP2") at 267-68 ¶¶3-4. Note, the City also collects funds for sewage services, but can only spend utility revenue on utility-related services, and thus those funds are not included in this total. Id. at ¶¶5-7. The City also receives state grant funds, which are also restricted. Id. at ¶¶3-4. *(NOTE, the Clerk restarting the page numbering for the City's Supplemental Designation, and thus citations to these supplemental materials will be designated CP "2".)*

[12] CP2 at 268 ¶¶4-7

[13] CP2 at 1 ¶2.

$175,000, which is a 50.42% reduction. For simplicity sake, this brief will treat this as a 50% reduction, and thus the rates in appendix A can be cut in half to determine the rates actually imposed.

The trial court used variable rate penalties, primarily for the purpose of imposing a reduced penalty during the period between when the trial court first ruled in favor of the City (May 13, 2005) and when this Court reversed that ruling (August 27, 2007). These variable rates are identified in Appendix A (at twice the actual rate imposed).[14]

C. Procedural History

This lawsuit involves 33 violations of the PRA that occurred between September 2002 and June 2003, which stemmed from a flood of requests the Zinks made during this period.[15] The Zinks filed this lawsuit in April 2003, but it was not tried until 2005, with the trial court ruling in the City's favor May 13, 2005, and entering findings June 22, 2005.[16] As of that date, the City was still withholding unredacted records responsive to 11 requests. Although it produced responsive records for two of those requests during the pendency of the first appeal, it continued to withhold records for 9 requests until the date of the second judgment. The

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[14] The Zinks reference "average" penalty rates in their brief, but those average rates have no basis in the trial court's ruling at issue in this case. In fact, the trial court expressly rejected the use of any "average" rate when it imposed penalties and instructed the parties to eliminate any "average" rates from their proposed orders, stating "I made no findings regarding the average penalty rate .... Those will not be in the final findings of fact and conclusions of law[.] " RP (6/29/16) at 5:2-5.

[15] *See Zink II*, 162 Wn. App. at 699 (noting the Zinks made between 68-172 requests during this period).

[16] *Zink I*, 140 Wn. App. 334-35.

withholding of these 9 categories of records for over four years was the primary cause of the high number of penalty days in this case.

The Zinks appealed and on August 23, 2007, this Court reversed and remanded the case back to the trial court.[17] The trial court held a new hearing July 16 and 17, 2008, where it found 33 violations of the PRA, determined the proper number of penalty days, and set daily penalty rates.[18] Judgement was entered on this ruling November 7, 2008 for a total of $167,930 plus an additional $72,309 in attorney fees.[19] This ruling excluded approximately 8000 penalty days that occurred between the entry of the court order dismissing the Zink's claim and the reversal of that order on appeal.[20]

Both parties appealed. During the pendency of that appeal, the Supreme Court issued its decision in *Yousoufian*, which adopted a 16-factor analysis for determining penalties.[21] The parties agreed that the penalty award had to be recalculated using these factors, and the primary issues resolved on the second appeal involved the number of penalties days. The parties now agree that there was a total of 23,117 days. CP 2412 ¶5.d.

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[17] *Zink I*, 140 Wn. App. 328

[18] *Zink II*, 162 Wn. App. at 701

[19] *Zink II*, 162 Wn. App. at 701. The City paid this attorney award along with accrued interest after the second appeal. CP 2486 ¶1.e. For the purposes of this appeal, the Court should assume all documents were produced as of November 7, 2008, which was the last date the penalties at issue in this case accrued.

[20] The City conceded this exclusion was improper on the second appeal. *See Zink II*, 162 Wn. App. at 707.

[21] *Zink II*, 162 Wn. App. at 701-02.

In 2011 (also during the pendency of the second appeal), the Legislature enacted SHB 1899, which amended RCW 42.56.550(4) to eliminate the $5-per-day minimum penalty. The Court noted this amendment and its effective date in a footnote in *Zink II*.[22]

After the second remand, the case sat idle in the superior court until the City moved for partial summary judgment in late 2015, seeking a ruling that SHB 1899 applied in this case. The trial court granted this motion in January 2016 (CP 332), and then held a three-day hearing in April 2016 to set penalties. This extended hearing was necessary because the original trial judge had retired so the parties had to inform the new trial judge on the specifics of each violation. This presentation was held exclusively on the transcript of the original hearing and exhibits from that hearing.

D. Trial Court Judgment at Issue on this Appeal

After the three-day hearing on April 2016, the trial court made a preliminary penalty ruling on May 10, 2016. The trial court explained that this ruling was based on an objective application of the 16 Yousoufian factors for each of the 33 violations. The trial court's objective analysis is evidenced in the 33 worksheets attached to and incorporated into the Findings and Conclusions entered in this case. CP 2437-2469. In this analysis, the trial court considered each factor and determined whether each factor was "strongly present," "moderately present", "not present" or "not applicable."

[22] *Zink II*, 162 Wn. App. at 703 n.3.

The preliminary penalties rates varied and were broken up into four periods, two of which are significant on appeal. CP 2414-15, ¶7.a. First, for five violations (violations 6, 8, 15, 16 and 22), the trial court quadrupled the daily penalty rate after June 23, 2003 from $5 per day to $20 per day, finding that a memo the City received on that date from MRSC relating to a different request not at issue in this case should have informed the City that its redaction of resident addresses in those five requests was in error. CP 2414 ¶7.b, 2442, 2444, 2452-52, 2458. Because this increase applied to 5,650 penalty days, it increased the total penalty by 1/3. CP 2471.

Second, for the period between the trial court's original ruling in favor of Mesa and this Court's first reversal of that ruling, the trial court set daily penalties at $1 per day for 10 of the 11 pending requests. CP 2415 ¶7.c.

While the trial court had attempted to calculate the total penalty prior to its May 10 oral ruling, an error occurred in the Excel formula the trial court had used to calculate penalties, and thus the trial court was surprised and troubled when it learned at the May 10 hearing that the total preliminary penalty award totaled $352,954 – an amount the trial court later ruled would be crippling to a small city like Mesa.[23]

The trial court therefore took this ruling under advisement and ruled that it would set the final penalty after considering the parties' proposed findings and conclusions. During this period, the City filed a motion to

[23] RP (5/10/16) at 41:6-22.

reduce this preliminary award, arguing that it had to be reduced based on Mesa's small size and because the increased penalty rate for 5 of the requests was not factually supported by the record.[24]

The trial court entered its final judgment on June 29, 2016. At this hearing, the trial court ruled that its preliminary award of $352,954 would "cripple[] the city" and therefore "would not serve the purposes of the PRA." RP (6/29/16) at 58:21-59:4. It would also "undermine the ... public's confidence in the courts and the public's confidence in the law." RP (6/29/16) at 59:8-10. The Court therefore entered a total penalty award of $175,000, finding that this amount was "sufficient to deter future conduct, not only on the part of the City of Mesa but other state agencies. It is such an amount that would avoid this windfall to the plaintiffs. It will certainly sting the city but will not, in my judgment, cripple them." RP (6/29/16) at 59:20-25; see also CP 2408-73.

The Court rejected the City's challenge to increased penalty rate for the five requests the City had challenged.[25] CP 2415 ¶7.b.

The Zinks subsequently filed an appeal and the City filed a cross appeal. CP 2474, 2549.

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[24] CP2 at 188-91.

[25] The trial court also awarded attorney fees that the Zinks had incurred in the second appeal, which the City is not challenging on this appeal. The Zinks have proceeded pro se after the second remand, and thus no additional fees were awarded.

E. The Trial Court's Ruling Related to the MRSC Letter Increased the Penalty Award by 1/3

Five of the violations at issue involve the redaction of identifying information (primarily addresses) for five groups of records:

- violation 6 (21 Code Violation files);[26]
- violation 8 (Resignation letters of Murphy and Erickson);[27]
- violation 15 (18 residential files);[28]
- violation 16 (11 residential files); and[29]
- violation 22 (Sharp Complaint)[30]

Originally, the trial court found "the redactions were in good faith."[31] The trial court, however, found that this changed after the City received a memo from MRSC on June 23, 2003.[32] While that memo related addresses listed in attorney invoices for a request that is not part of this lawsuit, the trial court ruled that the memo should have put the City on notice that its redaction of contact information in the five requests at issue was erroneous. The trial court therefore increased the daily penalty rate 4-fold to $20 per day for almost all of the remainder of the penalty period,[33] which totals 5650 days. Overall, this increased the penalty award by 1/3.[34]

Although the MRSC memo notes there is no general exemption for contact information, it expressly notes that there are some specific

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[26] CP2 at 126 v.4(6). Note, because the City argued there were only 29 violations, not 33, the City references violation 6 as violation 4. See supra note 9.
[27] CP2 at 131 v.6(8). Violation 8 is listed as violation 6 in this memo.
[28] CP2 at 137 v.12(15). Violation 15 is listed as violation 12.
[29] CP2 at 138 v.13(16). Violation 16 is listed as violation 13.
[30] CP2 at 140 v.18(22). Violation 22 is listed as violation 18 in this memo.
[31] CP 2442 note 1.
[32] CP 1062-63. A copy of this memo is included as appendix B to this brief.
[33] The rate for these 5 requests was reduced to $1 per day during the appeal period.
[34] $15 per day for 5650 totals $84,750, which is ¼ of the total preliminary award of $352,954, thus representing a 33% increase from $268,205 to 352,954.

exemptions for contact information, including exemptions that the City was relying upon for its redactions at issue in violations 6, 8, 15, 16 and 22.

V. ARGUMENT

A. The Trial Court Properly Applied the 2011 Amendment When Setting Daily Penalty Rates in This Case

In 2011, (during the pendency of the second appeal), the Legislature passed SHB 1899, which eliminated the minimum $5-per-day penalty for PRA violations. The trial court ruled on summary judgment that this amendment applied in this case and therefore that it was not required to impose a $5-per-day minimum penalty. This ruling was proper because the amendment was remedial and the application of the amendment would further the Legislature's purpose of eliminating the harsh consequences caused by the minimum penalty.

1. The 2011 Amendment Was Remedial and Applied to All Pending Cases as soon as It Became Effective

Under the "[c]ontrolling authority" in this state, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[35] *In re A.M.M.*, 182 Wn. App. 776, 789, 332 P.3d 500 (2014). This is particularly true with the Legislature amends a remedial

[35] A result would be manifestly unjust only if it "affected a substantive or vested right." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). A person cannot have a vested right in a cause of action created by statute. *Ballard Square Condo. Owners' Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617-18, 146 P.3d 914 (2006). An example of a statute that affects a substantive right would be one that created an entirely new cause of actions. *Agency Budget Corp. v. Wash. Ins. Guar. Ass'n*, 93 Wn.2d 416, 425, 610 P.2d 361 (1980). The issue of vest rights is addressed more thoroughly below.

statute –"remedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). "A statute is remedial when it relates to practice, procedure, or remedies[.]" *Pillatos*, 159 Wn.2d at 473 (quotation omitted). Amendments to statutory penalties are remedial. *See Marine Power & Equipment Co. v. Human Rights Comm'n*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985).

This rule applies even when a judgment has been entered in a case and an appeal is pending. "[W]here a controlling law changes between the entering of judgment below and consideration of the matter on appeal, the appellate court should apply the new or altered law[.]"[36]

While the application of remedial statutes to past conduct is sometimes referred to as the "retroactive" application of the new law,[37] technically, this is incorrect. "A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Pillatos*, 159 Wn.2d at 471 (citation omitted). In contrast, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations

[36] *Marine Power*, 39 Wn. App. at 620; *see also Pillatos*, 159 Wn.2d at 468, 473-74; *West v. Thurston County*, 144 Wn. App. 573, 583-84, 183 P.3d 346 (2008) (applying amendment to Public Records Act enacted while case was on appeal).

[37] *See, e.g., Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986) ("A remedial statute is presumed to apply retroactively."), *overruled on other grounds by State v. Campbell & Gwinn*, LLC, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

based in prior law." *Pillatos*, 159 Wn.2d at 471 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994)).

The presumption that a court should apply the law currently in effect is particularly strong when the legislature has amended a statutory penalty provision. Thus, if the application of the statute to prior conduct "would further the remedial purposes of the statute and amendment," courts will presumptively apply it to actions pending at the time of the amendment, even when that action is pending on appeal. *Marine Power*, 39 Wn. App. at 618. This is because "the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one." *Addleman*, 107 Wn.2d at 510 (discussing amendment to criminal penalty). "[I]t would be anomalous for an appellate court to apply an obsolete law where no vested right or contrary legislative intent is disturbed by applying a more current law." *Marine Power*, 39 Wn. App. at 621 (discussing civil penalties). Courts therefore have routinely applied legislative amendments to remedies created by statute to actions that occurred prior to the amendment, even when a cause of action was filed prior to the amendment.[38]

Here, SHB 1899 was remedial because it amended an existing statutory penalty provision – RCW 42.56.550(4) – and therefore a

[38] *Marine Power*, 39 Wn. App. at 621 (discussing civil penalties); *Bayless v. Community College Dist.*, 84 Wn. App. 309, 927 P.2d 254 (1996) (statutory amendment to allow damages for whistleblowers applied to lawsuit filed before amendment); *Robin L. Miller Const. Co. v. Coltran*, 110 Wn. App. 883, 43 P.3d 67 (2002) (statutory amendment that eliminated a loophole in the homestead statute applied to judgment entered prior to the amendment).

presumption exists that penalties in any existing case should have been set using the amended version of the statute. That presumption was properly applied in this case because the amendment does not affect any vested or substantive right, and there is no evidence of any legislative intent to only have the law apply prospectively.[39]

The Zinks claim, however, that all legislative amendments are presumed to apply prospectively absent clear evidence of an intent to have the law apply in pending cases. That is not true, however, when an amendment is curative or remedial.[40] The 2011 amendment here was remedial and thus the presumption regarding prospective application was reversed.

The Zinks also claim that the SHB 1899 was not remedial because it did not clarify any ambiguity and it created a new liability. The Zinks' argument confuses "curative" amendments with "remedial" amendments.[41] SHB 1899 is remedial, not curative.

Next, the Zinks cite *State v. Humphrey*, 139 Wn.2d 53, 983 P.2d 1118 (1999) to claim that SHB 1899 was not remedial because created a

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[39] See infra § V.A.4

[40] *See Ballard Square Condo. Owners' Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617, 146 P.3d 914 (2006) ("A statute will also apply retroactively if it is curative or remedial."); *State v. Applegate*, 147 Wn. App. 166, 173, 194 P.3d 1000 (2008) ("the general rule that statutes operate prospectively does not apply to remedial statutes"); *Marine Power*, 39 Wn. App. at 616-17 ("this presumption is reversed to favor retroactive application if the enactment is remedial and concerns procedure or forms of remedies") (quotation omitted).

[41] *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584-86, 146 P.3d 423 (2006) (conducting separate analyses to determine if amendment was "curative" or "remedial").

new liability. *Humphrey*, however, does not support this claim. First, it is a criminal case, which raises ex post facto issues. *See Humphrey*, 139 Wn.2d at 61-62 (noting ex post facto concerns). Second, it discussed an amendment that increased a liability provision. *See Humphrey*, 139 Wn.2d at 62 (amendment increased penalty from $100 to $500).

Here, SHB 1899 decreases a penalty provision – it does not create any new liability. The Zinks want to ignore the fact that it is Mesa – not the Zinks – that are being penalized. If SHB 1899 had increased the daily penalty, Mesa (not the Zinks) might have some type argument – but the lowering of a penalty simply does not raise any of the types of concerns in *Humphrey*. Thus, the Court should reject that Zinks assertions and find that that SHB 1899 is remedial and presumed to apply to pending cases like the case at bar.

The Zinks also make numerous arguments why they were entitled to have penalties set under the repealed version of the law. None of these arguments have merit or are sufficient to overcome the presumption that SHB 1899 applied in this case.

2. The Application of the 2011 Amendment to This Case Furthers the Legislative Intent of SHB 1899

The Zinks argue that the Legislature intended SHB 1899 only to apply prospectively. The presumption that remedial statutes apply to pending cases can be overcome by evidence of a "clear legislative intent"

only to have the law apply prospectively.[42] An example of a clear expression of legislative intent would be an unambiguous statement by a bill's sponsor that the law would not apply to pending cases. *See Dep't of Labor & Indus. v. Metro Hauling Inc.*, 48 Wn. App. 214, 218-19, 738 P.2d 1063 (1987).

To overcome the presumption that the Legislature intended SHB 1899 to apply to prior violations, the Zinks would have to show the Legislature intended to have courts continue to apply the repealed penalty provisions for violations that occurred prior to the effective date of SHB 1899. No such evidence exists.

The 2011 amendment eliminated the $5 minimum daily penalty. The only reasonable explanation for this change was that the Legislature believed that requiring a $5 minimum daily penalty was unduly harsh in cases with a high number of daily penalties. This amended was intended to give the trial court "broad discretion to set appropriate penalties." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016). The timing of this amendment strongly supports this conclusion.[43]

The Legislature introduced SHB 1899 just months after the Supreme Court noted that the mandatory nature of the five-dollar-per-day minimum

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[42] *See Bayless*, 84 Wn. App. at 314 (presumption that remedial statutes will apply to pending cases can only be overcome by "a clear legislative intent for prospective application").

[43] *See McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) ("We often apply amendments retroactively where an amendment is enacted during a controversy regarding the meaning of the law.") (quotation omitted).

penalty requirement "may seem harsh, but it is the unambiguous meaning of the statute." *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010). The Supreme Court's decision in *Sanders* was the third Supreme Court decision that highlighted the unduly harsh nature of the minimum-per-day penalty requirement. *See Yousoufian 2004*, 152 Wn.2d at 433, 436-38; *Koenig v. City of Des Moines*, 158 Wn.2d 173, 188, 142 P.3d 162 (2006).

In *Sanders*, the issue of penalty days arose because litigation delays. The Attorney General's office sought to have that period of time excluded from the penalty calculation. Otherwise, the AGs argued, that imposition of mandatory daily penalties creates "the risk [for agencies] of being severely penalized for delays that are not of [the agency's] making." *Sanders*, 169 Wn.2d at 863.

The Court rejected the AGs' argument based on the unambiguous statutory language as interpreted in *Yousoufian 2004*:

> Regardless of who delayed in *Yousoufian*, the agency was not the party at fault. Consistent with *Yousoufian*, we should hold that the PRA requires the agency to pay a penalty for each day the requester is unable to inspect or copy a nonexempt record, regardless of whether the agency created the delay.

Sanders, 169 Wn.2d at 863-64. In response to the AGs' claim that this result was unjust, the Court responded that its hands were tied by the 1992 amendment that added the $5 minimum penalty – "This rule may seem harsh, but it is the unambiguous meaning of the statute." *Sanders*, 169 Wn.2d at 864.

In the very next legislative session, just months after *Sanders* decision was issued, SHB 1899 was introduced in the Legislature to eliminate the five-dollar-per-day minimum penalty. Given this timing and effect of the legislation, the only possible purpose the Legislature would have for enacting the amendment was to eliminate the unduly harsh nature of the minimum daily penalty identified in the *Sanders* case.

This conclusion is bolstered by the fact that the persons testifying in favor of SHB 1899 (including the author of this brief, who testified on behalf of Mesa) supported the bill because the five-dollar-per-day minimum penalty "works a disproportionate hardship on small jurisdictions, especially considering how long the legal process takes." Senate Bill Report SHB 1899, Staff Summary of Public Testimony on Substitute House Bill.

When retroactive application of a remedial amendment furthers its remedial purpose, it is strong evidence of the Legislature's intent that the amendment should apply to pending cases. *Marine Power*, 39 Wn. App. at 618. If SHB 1899 was amended to prevent the imposition of unduly harsh penalties, the application of SHB 1899 to pending cases would further that intent.

Mesa's plight is the poster child for the unduly harsh nature of a mandatory minimum for daily penalties. This is not to say penalties are not warranted in this case – Mesa concedes that they are. But court delays in this case have resulted in a significant increase in the number of daily penalties that must be awarded. For example, almost 1/3 of the penalty days

can be attributed to the period of time from when the trial court first entered judgment in Mesa's favor in 2005 and the Court of Appeals ruling vacating that dismissal in 2007.

Per-day penalties that accrue during litigation delays bare little to no relationship to the City's culpability and thus imposition of a $5-per-day minimum penalty would not serve any purpose. In contrast, it furthers the Legislature's purpose for enacting SHB 1899 to apply the amendment to this case because it would allowed the trial court to set a penalty award that equates to the City's actual culpability and serves as a deterrent without causing financial ruin.

Faced with this clear legislative purpose that is furthered by applying SHB 1899 in this case, the Zinks point to three ambiguous facts that they claim show the Legislature only intended SHB 1899 to apply prospectively.

First, they note that SHB 1899 did not contain an emergency clause or an express retroactive application clause. The most likely reason the Legislature did not include a retroactivity clause was because SHB 1899 amended a statutory penalty provision, making it remedial and thus there was already a presumption that SHB 1899 applied to pending cases and no "retroactivity" clause was needed. *Marine Power*, 39 Wn. App. at 619 (retroactivity clause removed from draft legislation because amendment

was remedial so clause was not needed). The same is true for an emergency clause.[44]

Second, they note that another amendment to the PRA in 2011 involving penalties in inmate cases did contain a retroactive application clause (SB 5025). Even if language in a separate piece of legislation was relevant, the Zinks' arguments is misplaced because SB 5025 exclusively involved penalty awards in inmate cases. *See* RCW 42.56.565(1). Amendments to penalty provisions involving criminal defendants potentially implicate the anti-retroactivity savings clause in RCW 10.01.040. The Legislature likely included the retroactivity clause to ensure the savings clause did not prevent retroactive application.[45]

In contrast, SHB 1899 applied to all penalty awards, not just awards to inmates, and thus there was no risk of RCW 10.01.040 applying to SHB 1899. Because SHB 1899 was remedial, no express retroactivity clause was necessary.

Third, the Zinks note that one of the persons (the author of this brief) testifying in favor of SHB 1899 asked the Legislature to include a retroactivity clause, but no such clause was included in SHB 1899. The fact that one witness requested the Legislature included a retroactivity clause and no such clause was included does not demonstrate an intent not to have the law apply to pending cases. The *Marine Power* court rejected a similar

[44] *See Agency Budget*, 93 Wn.2d at 425 ("[h]ad the legislature intended a retroactive effect, there would have been no need for an emergency clause.")
[45] It is no necessary to determine if RCW 10.01.040 would have in fact applied – its existence simply provides a reasonable explanation for the different language in the two amendments, which prevents the distinction from supplying any "clear legislative intent."

argument when a retroactivity clause was removed from an amendment to a penalty provision. *See Marine Power*, 39 Wn. App. at 619-20 & n.2 (clause removed because it was unnecessary based on the existing presumption).

Here, the most likely explanation for the Legislature's decision not to include a retroactivity clause was the same reason for not including such clause in the legislation at issue in *Marine Powers* – SHB 1899 is remedial and thus presumed to apply to pending cases, making a retroactivity clause unnecessary.

Finally, it is worth noting that the Zinks fail to provide any rational explanation for why the Legislature would want to require courts to continue to impose a $5-per-day minimum penalty for pending cases after the Legislature eliminated that minimum penalty as being unduly harsh and unnecessary.

In sum, given that the application of SHB 1899 to pending cases such as this would further the Legislative purpose of preventing unduly harsh penalties, the Zinks' ambiguous "evidence" does not qualify as clear evidence that would overcome the presumption that SHB 1899 applied to pending cases.

3. The Law of the Case Doctrine Does Not Bar the Application of the 2011 Amendment to this Case.

The Zinks argue that the 2011 Court of Appeals decision in this case "resolved" the issue of whether SHB 1899 could apply by ruling that the

2003 version of the PRA applied to this case. This is both factually and legally incorrect.

Factually, a close reading of the 2011 opinion shows that the Court did not make any ruling regarding what version of the PRA the trial court had to use to set penalties. The Zinks cite to four aspects of the 2011 opinion and rulings, but none of these amount to a legal ruling that required the trial court to set penalties using the repealed statute.

First, the Zinks note that the Court referenced the prior $5-per-day minimum penalty throughout its opinion. While the Court did in fact reference that range, the Court was careful only to do so when describing what the trial court had previously done. The Court never reference the $5-per-day minimum penalty when ruling on how the trial court was required to determine penalties on remand. See *Zink II*, 162 Wn. App. at 699, 705-06, 722, 729, 730; *see also* CP 314-15 (identifying 6 examples).

Second, the Zinks claim footnote 1 was a legal ruling that required the trial court to use former 42.17 RCW on remand. *See Zink II*, 162 Wn. App. at 698 n.1. But this footnote is a typical footnote added to simplify citations.[46]

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[46] *See Burt v. State*, 168 Wn.2d 828, 832 n.1, 231 P.3d 191 (2010) ("The PRA was previously named the public disclosure act (PDA), and the portion of the PDA concerning public records was formerly codified at RCW 42.17. For simplicity, we refer to the PDA as the PRA unless otherwise noted."). The Supreme Court regularly used similar footnotes, although it oscillated between citing the repealed or new version of the statute. *See, e.g., Bellevue John Does v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 205 n.2, 189 P.3d 139 (2008) (electing to cite to former 42.17 RCW); *Livingston v. Cedeno*, 164 Wn.2d 46, 49 n.1, 186 P.3d 1055 (2008) (citing to 42.56 RCW); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 728, 174 P.3d 60 (2007) (citing to both chapters).

Third, the Zinks claim footnote 3 in the Court's 2011 opinion is a ruling that SHB 1899 did not apply retroactively. *See Zink II*, 162 Wn. App. at 703 n.3. But nothing in footnote 3 suggests the Court was making an advisory ruling that SHB 1899 only applied prospectively.

Fourth, the Zinks claim that the Court's denial of the City's motion for reconsideration amounts to a ruling that SHB 1899 could not be applied retroactively. But the City's motion amounted to a request for an advisory ruling, which the Court was not empowered to make (see below) and its summary denial was not a ruling on the merits of the City's request. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (summary denial of petition for rehearing is not binding ruling on the merits of the relief sought in motion).

Legally, any ruling in Zink II would have been purely advisory and therefore improper.[47] Moreover, the law of the case doctrine cannot prohibit

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[47] *See Franklin County v. Parmelee*, 175 Wn.2d 476, 481, 285 P.3d 67 (2012) (ruling appellate court erroneously made advisory ruling on retroactive application of amendment to PRA penalty provision). Courts have regularly applied SHB 1899 to violations that occurred prior to its effective date, albeit without expressly analyzing the issue. *See Bricker v. State*, 164 Wn. App. 16, 21 & n.3, 262 P.3d 121 (2011) (in lawsuit filed in 2008, holding the amended version of 42.56.550(4) without the five dollar minimum penalty was the "applicable statutory provision" because "[i]n an amendment that took effect on July 22, 2011, the legislature struck the words "not less than five dollars," thereby eliminating the $5 per day minimum penalty.") (citing Laws of 2011, ch. 273 §1); *West v. Thurston County*, 168 Wn. App. 162, 188 & n.29, 275 P.3d 1200 (2012) (ruling in a lawsuit filed in 2007 that "[b]efore July 22, 2011, courts had to impose a minimum penalty of $5. Courts are now free to impose a daily penalty from $0 to $100.") (citing Laws of 2011, Ch. 273 §1); *see also Forbes v. City of Gold Bar*, 171 Wn. App. 857, 864, 288 P.3d 384 (2012) (apply amended version of RCW 42.56.550(4) to lawsuit filed in 2010); *Germeau v. Mason Cty.*, 166 Wn. App. 789, 811, 271 P.3d 932 (2012) (apply amended version of RCW 42.56.550(4) to lawsuit filed in 2009); *DeLong v. Parmelee*, 164 Wn. App. 781, 787, 267 P.3d 410 (2011) (applying amended version of RCW 42.56.550(4) to consolidated cases filed in 2006 and 2007).

a future court from applying a newly enacted statute like SHB 1899.[48] "The rule is that appellate courts will review those questions only which are essential to a determination of the case, not those a decision of which can be no more than advisory, in no way becoming a part of the law of the case."[49]

4. The Application of the 2011 Amendment to This Case Will Not Violate Constitutional Protections

The Zinks argue that the application of SHB 1899 in this case would violate several constitutional protections but none of these arguments have merit. The ruling does not violate the ex post facto clause because this is a civil statute and the Zinks are not facing any increased penalty.[50]

The ruling does not violate equal protection or due process because the Zinks cannot have a vested right in a statutory remedy.[51] Because the legislature could have entirely extinguished this statutory cause of action, it

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[48] *See Roberson v. Perez*, 156 Wn.2d 33, 41-43, 123 P.3d 844 (2005); *State v. Schwab*, 134 Wn. App. 635, 644, 141 P.3d 658 (2006) (because of intervening change in law, trial court could reinstate conviction vacated in first appeal); *see also* 5 C.J.S.2d APPEAL AND ERROR §1008, "Effect of change in law" (law of case doctrine does not apply when intervening change of law, including statutory amendments to statutory causes of action).

[49] *Brace v. Pederson*, 106 Wash. 573, 576, 190 Pac. 917 (1919); *see also Franklin County*, 175 Wn.2d at 481 (court of appeals erred by making an advisory ruling regarding whether amendment to the PRA applied retroactively).

[50] *In re Estate of Haviland*, 177 Wn. 2d 68, 81, 301 P.3d 31, 38 (2013) (holding statute that disinherited persons did not violate ex post facto because it was civil in nature) (citing *State v. Schmidt*, 100 Wn. App. 297, 299, 996 P.2d 1119 (2000), *aff'd* 143 Wn.2d 658, 23 P.3d (2001)).

[51] *Ballard Square*, 158 Wn.2d at 617-18 (holding that state can abolish statutory cause of action while a case is pending on appeal).

also retains the authority to reduce the penalty amount authorized by that statute.[52]

5. The Application of the 2011 Amendment to This Case Will Not Violate the Separation of Powers Doctrine

Finally, the Zinks' separation of powers argument is based entirely on a court of appeals decision that they know has been overruled – *In re Stewart*.[53] While *Stewart* supported their argument, the Supreme Court overruled *Stewart* in *Hale v. Wellpinit School District*.[54] After *Hale*, it is clear that "the legislature is not prohibited from passing amendments that directly impact cases pending in our court system." *Hambleton*, 181 Wn.2d at 822. As long as the amendment is "facially neutral law for the court to apply to the facts before it, [it does] not violate the separation of powers."[55]

6. The Trial Court Properly Applied the Law in Effect in 2016 when It Set Penalties.

In summary, the presumption is that courts entering judgment will apply the law in effect at the time the court enters judgment, which includes applying any amendments enacted after the lawsuit was filed. When new

[52] *See Ballard Square*, 158 Wn.2d at 619 (because legislature could abolish a statutory cause of action, it could also take the lesser action of reducing the statute of limitations without affecting any vested right).

[53] *In re Stewart*, 115 Wn. App. 319, 75 P.3d 521 (2003), *overruled by Hale v. Wellpinit School Dist.*, 165 Wn.2d 494, 509 n.6, 198 P.3d 1021 (2009)

[54] *Hale v. Wellpinit School Dist.*, 165 Wn.2d 494, 509 n.6, 198 P.3d 1021 (2009); *see also In re Hambleton*, 181 Wn.2d 802, 822, 335 P.3d 398 (2014) (reaffirming *Hale* and holding that when the Legislature intends new legislation to apply retroactively, "an appellate court must apply that [amended] law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

[55] *Wash. State Farm Bureau v. Gregoire*, 162 Wn.2d 284, 304, 174 P.3d 1142 (2007) ("*WSFB*") (alteration original, quotation omitted); *see also Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1322-24 (2016) (noting the limits of the court's authority to find a legislative statute that affects a pending case violates the separation of powers doctrine).

legislation amends a statutory remedy, it is "remedial" and presumed to apply once it becomes effective. The Zinks have failed to offer any legal justification other than overruled case law to overcome this presumption. Moreover, it would further the Legislature's intent for it to apply in this case and frustrate that intent not to apply the amendment.

B. The Trial Court Had the Authority to Make a Global Reduction Based on Deterrence and the City of Mesa's Small Size and Limited Resources

When the Supreme Court adopted the 16 *Yousoufian* factors, it stressed that the factors were "offered only as guidance" and "should not infringe upon the considerable discretion of trial courts to determine PRA penalties." *Yousoufian 2010*, 168 Wn.2d at 468. Here, after conducting an objective application of the 16 *Yousoufian* factors to the 33 violations, the trial court came up with a preliminary penalty ruling that, if imposed, would "cripple" the City because it was more than twice what the City collected in general fund taxes.[56] The trial court also found that such a massive penalty would undermine the public's confidence in the PRA. The trial court therefore reduced this penalty by 50%.

Under *Yousoufian*, the trial court had the discretion to make an across-the-board reduction of its preliminary ruling based on the consideration of deterrence and a consideration of the policy goals of the PRA.

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[56] RP (6/29/17) 58:21-59:4.

1. Penalties that Exceed the Amount Needed for Deterrence Undermine the Policy Goals of the PRA

The ultimate purpose of the PRA is to empower the public by providing the public with access to the information the public needs to hold public officials accountable. See RCW 42.56.030. This is the public's right – the public has "agreed" to our democratic form of government and agreed to fund that government with their tax dollars. The public then elects representatives who control how those tax dollars are spent. Our elected representatives are not free to exercise that control for their own ends. Rather, our elected representatives serve as trustees[57] who are required to spend the tax dollars in a manner that benefits their beneficiaries, the public.

One way to consider the PRA is as a theoretical string the public attaches to its tax dollars that gives the "beneficiaries" the right and ability to see how the "trustees" are using those tax dollars.[58] This information in turn empowers the public to use the vote to switch trustees when the trustees are misusing the public's tax dollars.

"[T]he purpose of the PRA's penalty provision is to deter improper denials of access to public records. The penalty must be an adequate incentive to induce future compliance."[59] Penalties therefore serve a crucial role in helping the public monitor and ultimately protect their tax dollars.

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[57] *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) (elected city councilmember "casts his vote as trustee for his constituents") (quotation omitted)

[58] As the current Washington State Attorney General has noted, the PRA is intended to ensure the public has "right to know how their government is spending their tax dollars." See Bob Ferguson, "Open Government Ombudsman Function," section 3 "Why the Attorney General Offers this Service" available at at http://www.atg.wa.gov/open-government-ombuds-function (last visited June 17, 2017); see also supra note 1.

[59] *Yousoufian 2010*, 168 Wn.2d at 462-63.

Penalties, however, are an imperfect tool for keeping the "trustees" in line because PRA penalties are ultimately paid by the very people these penalties are intended to serve. They are not paid by the individuals who violate the PRA. Therefore, a penalty award that significantly exceeds the amount necessary to induce future compliance amounts to the very type of waste of public tax dollars that the PRA is intended to help prevent.

When a court is determining a proper penalty award, the court must keep the ultimate purpose of protecting the public and their tax dollars at the forefront of the court's analysis. A court should strive for a balance by entering a penalty award that is sufficient to induce compliance but that is not so excessive as to cause the very waste the PRA is intended to help prevent.

The size of the agency at issue must therefore be a central consideration in this balance. As the Supreme Court noted in *Yousoufian*, "the penalty needed to deter a small school district and that necessary to deter a large county may not be the same." *Yousoufian 2010*, 168 Wn.2d at 463. A court must also take the total number of daily penalty awards into account. *See Wade's*, 185 Wn.2d 270 (setting penalties as low as $0.01 per day). The trial court therefore had the authority to recalibrate a preliminary penalty award by taking deterrence into consideration and properly exercise its considerable discretion by reducing the preliminary penalty award to an amount that serves the purpose of the PRA.[60]

[60] *See, e.g., Bricker*, 164 Wn. App. at 21 (reducing preliminary penalty award by 95%); *see also Yousoufian 2010*, 168 Wn.2d at 468-69 (adjusting penalties across the board).

The trial court properly exercised its discretion when it made the across-the-board reduction. After analyzing the 33 violations in an objective manner using the 16 *Yousoufian* factors, the trial court reached a preliminary penalty ruling of $352,954. CP 2413-14 ¶5.h. After reaching this preliminary result, the trial court ruled that it was required to "stand back and look at [the] result to make sure it really makes sense." RP (5/10/16 at 41:11-14). The trial court was "a little unsettled" with this high award and needed time to reflect to determine if the award was proper. RP (5/10/16 at 41:15-16). The trial court permitted the parties to submit proposed findings while it took time to consider what ultimate penalty should be awarded.

The City then filed a motion to reduce the penalty award based on Mesa's small size, its limited resources, and the PRA's dual goals of deterrence and punishment.

After further contemplation and consideration of the City's motion, the trial court ruled that its preliminary award of $352,954 would "cripple[] the city" and therefore "would not serve the purposes of the PRA." RP (6/29/16) at 58:21-59:4. It would also "undermine the ... public's confidence in the courts and the public's confidence in the law." RP (6/29/16) at 59:8-10. The Court therefore entered a total penalty award of $175,000, finding that this amount was "sufficient to deter future conduct, not only on the part of the City of Mesa but other state agencies." RP (6/29/16) at 59:20-22.

The trial court properly excised its discretion when it ruled that the preliminary penalty award was excessive and had to be reduced based on deterrence. As the trial court noted when making this ruling, it is consistent with the guidance the Supreme Court provided in *Yousoufian*: "The penalty must be an adequate incentive to induce further compliance. I would note that the *Yousoufian* factors give me a structure within which to analyze the violations and come up with a penalty, but ultimately the statute entrusts the assessment of penalties to the discretion of the trial court." RP (6/29/16) at 58:15-20.; *see also Yousoufian 2010*, 168 Wn.2d at 468 (16 factors "should not infringe upon the considerable discretion of trial courts to determine PRA penalties"). The Zinks' assertions on appeal (and the original cause of the excessive preliminary penalty ruling) was the rigid, objective application of the *Yousoufian* factors.

While an across-the-board reduction can properly ensure the trial court exercises its discretion when imposing penalties, the entire dispute would have been avoided if the trial court did not believe it was required to first apply the 16 *Yousoufian* factors in such a rigid and objective manner. CP 2414 ¶6.a-6.b.

As part of its trial memorandum, the City provided an alternative, comprehensive process for applying the *Yousoufian* factors that eschewed the rigid mitigating/aggravating dichotomy and incorporated the 16 factors into four broad categories that can be colloquially summarized as "what happened", "why did it happen", "was anyone hurt", and "how can the court ensure it doesn't happen again". More formally, these are referred to as

(1) procedural requirements; (2) agency motivation (good-faith/bad-faith); (3) foreseeable harm; and (4) deterrence.[61] The 16 *Yousoufian* factors were reorganized into 11 factors that fit into these four categories. Although the trial court agreed these four broad categories accurately incorporated the *Yousoufian* analysis, it felt constrained to apply the *Yousoufian* factors in a rigid manner. CP 2414 ¶6.

The only legal issue before this Court is whether the trial court relied on the deterrence rationale to reduce the preliminary penalty award, so this brief will not restate the entire alternative analysis. But the City urges the Court to use this decision to re-emphasis the broad discretion the trial courts have when setting penalties, and remind trial courts that they are not required to apply the *Yousoufian* factors in such a rigid manner.

2. Deterrence, Rather than Punishing Bad Faith, Should Serve as the Ultimate Goal of PRA Penalties.

"[T]he purpose of the PRA's penalty provision is to deter improper denials of access to public records. The penalty must be an adequate incentive to induce future compliance." *Yousoufian 2010*, 168 Wn.2d at 462-63. The trial court's oversized preliminary penalty award was the result of the trial court's original refusal to properly consider deterrence, which resulted in an overemphasis on bad faith. As the Supreme Court noted in *Yousoufian 2010*, "a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination[.]" *Yousoufian 2010*, 168 Wn.2d at 461.

[61] CP2 at 95-103.

A simple hypothetical illustrates the risk of overemphasizing bad faith when setting penalties. Imagine an agency employee hides records requested in a PRA request to hide the employee's theft from the agency. As a result, the agency silently withholds records from a PRA requestor. The silent withholding of records to hide misconduct is the worst type of bad faith in this situation. But using the employee's actions designed to hide his theft from the agency as a basis for increasing the penalty on the agency results in the public being punished for being the victim of theft and misconduct. Such a perverse result would undermine the good-government goals of the PRA and is not justified.

This is not to say bad faith is not relevant – it simply demonstrates that bad faith alone cannot justify a high penalty award because the actor who engages in bad faith conduct is not the person who has to pay that penalty. Therefore, courts setting PRA penalties must take care to ensure that an agency's bad faith is not unduly emphasized.

Deterrence has long been considered the most important role for the imposition of penalties.[62] The Supreme Court put deterrence at the forefront of penalty determination in *Yousoufian 2010* when it considered *ACLU v. Blain School Dist.*, 95 Wn. App. 106, 975 P.2d 536 (1999). In the *ACLU*

[62] *See, e.g., Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978) ("Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute."); *Armen v. City of Kalama*, 131 Wn.2d 25, 36, 929 P.2d 389 (1997) ("This court has emphasized that strict enforcement of this provision will discourage improper denial of access to public records. Since the award has been treated as a penalty it is not necessary for a party to show actual damages to receive the statutory award.") (quotations omitted); *West v. Thurston County*, 168 Wn. App. at 188-89 (noting deterrence was one of the principle factors for setting penalties under *Yousoufian*).

only imposing a $5-per-day penalty in light of the school district's lack of good faith. *ACLU*, 95 Wn. App. at 115. The court of appeals therefore doubled the penalty to $10 per day, which was imposed for 577 days.

In *Yousoufian*, after the Supreme Court vacated the $5-per-day award and remanded the case for a new penalty hearing, the trial court looked to the *ACLU* because the county, like the school district, had not acted in good faith. *Yousoufian 2010*, 168 Wn.2d at 460. The Supreme Court ruled that this case was distinguishable for *ACLU* because of the deterrence factor, based on the size of the agency:

> [T]he trial court failed to consider deterrence as a factor in determining the penalty. ... [T]he purpose of the PRA's penalty provision is to deter improper denials of access to public records. The penalty must be an adequate incentive to induce future compliance. ... [A]s [the requestor] points out, the trial court implicitly averted the deterrence factor by analogizing to *ACLU*. In *ACLU*, the agency in question was a small school district, but here the county is the most populous county in the state. The penalty needed to deter a small school district and that necessary to deter a large county may not be the same.

Yousoufian 2010, 168 Wn.2d at 463. One of the lessons courts appear to have learned from this decision is that the deterrence effect of the total penalty award is significantly more relevant than the specific daily penalty rate, which care vary widely from decision to decision.[63]

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[63] *Compare, e.g., Bricker*, 164 Wn. App. at 29 (affirming $90 per day penalty despite no finding of bad faith) *with Francis v. DOC*, 178 Wn. App. 42, 66, 313 P.3d 457 (2013) (affirming variable-rate penalty of $5 & $10 per day despite finding of bad faith) and

As these cases demonstrate, when considering the necessity of deterrence, the over-all size of the total penalty award, rather than the daily penalty rate, is the most important consideration.

The trend of penalty awards under the PRA is consistent with how federal and out-of-state courts treat punitive damage awards in tort lawsuits. Statutory penalties play the same role as punitive damages. Size and ability to pay are regularly recognized as a key factor when setting punitive awards because such awards are meant to serve as deterrents, not to compensate for damages.[64] Any punitive award that exceeds the amount needed to deter and punish the wrongdoer is contrary to public policy and only serves to provide a "windfall to the individual litigant[.]"[65]

It is noteworthy that the Washington Supreme Court cited the avoidance of imposing penalties that amount to "windfall" as part of its rational for allowing the grouping of requests to reduce the number of penalty days.[66]

Adams v. DOC, 189 Wn. App. 925, 954, 261 P.3d 749 (2015) (imposing $35-per-day for bad faith violation).

[64] *See generally* Restatement (First) of Torts §908 ("The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person."); 79 ALR 3d 1138 (admissibility of lack of wealth as mitigation factor in punitive damages awards); *see also, e.g., Patterson v. Balsamico*, 440 F.3d 104, 122 (2d Cir. 2006) ("one purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay."); *Hazelwood v. Illinois Central Gulf R.R.*, 450 N.E.2d 1199, 1207 (Ill. App. 1983) ("Punitive damages should be large enough to provide retribution and deterrence but should not be so large that the award destroys the defendant.").

[65] *Vasbinder v. Scott*, 976 F.2d 118, 121-22 (2d Cir. 1992) (reducing punitive award to approximately 20% of defendant's annual income).

[66] *Yousoufian 2004*, 152 Wn.2d at 435 (awards should not "create a windfall only for individuals who make a voluminous request and do nothing to encourage disclosure for reasonable requests.").

Based on the importance of deterrence when setting penalties, it was appropriate here for the trial court to reduce its preliminary penalty award based on the fact that the preliminary award would "cripple" the city and greatly exceeded the amount needed to deter future violations.

3. The Trial Court's Preliminary Penalty Award Was Arbitrary When Total Awards for Each Violation Are Compared

The importance of affirming the trial court's authority to adjust a penalty award after conducting an objective analysis of the *Yousoufian* factors is best illustrated by comparing the daily penalty rates set by the court, which reflect this analysis, and the total preliminary penalty award for each violation, which do not.

It is uncontested that the violations regarding silent withholding of the Complaint against the Zink's home (violation 1) and the records related to the October 13, 2002 Board of Appeals meeting (violations 3 and 4) are the most egregious PRA violations at issue in this lawsuit. This is reflected in the fact that the trial court used the rate of $100-per-day for both violations in the preliminary ruling. When the trial court's daily penalty rates are compared, those rates line up with the trial court's culpability determinations. But when the total penalty awards are compared, there appears to be little relationship between total penalty awards and culpability. Thus, if the violations with the 10 highest daily penalty rates are compared with the violations with the highest total penalty awards, only two violations appear in both rankings:

Rank Based on Daily Penalty Rate		
	Violation	Top rate
1	Complaint (#1) (tie)	$100
1	BOA Min. & rules 1(#3&4) (tie)	$100
3	BOA adopted rule 1(#10&11)	$65
4	Maintenance log (#30)	$60
5	Complaint against Cade (tie) (#26)	$30
5	Council minutes (tie) (#29)	$30
5	Resolution 2003-03 (tie) (#31)	$30
5	Council meeting tape (tie) (#32)	$30
5	Draft dog ord (tie) (#33)	$30
10	Water meter (tie) (#13)	$25
10	Minute book (tie) (#27)	$25

Rank Based on Total Penalty		
	Violation	Tot. Penalty
1	Maintenance log (#30)	$45,358
2	BOA Min & Rules (#3&4)	$27,800
3	MRSC (#9)	$26,252
4	Standridge Timecard (#12)	$25,692
5	Phone fax Log (#14)	$25,432
6	Cade Scott reply (#23)	$24,952
7	Resignation Letters M&E (#8)	$24,267
8	21 code violation letters 2 (#6)	$24,087
9	18 Residential files (#15)	$23,932
10	Sharp complaint (#22)	$23,917

From CP2 at 277.

This near total disconnect between culpability and daily penalty rates on one hand and total preliminary penalty awards on the other hand demonstrates the arbitrary nature of the preliminary penalty award.

Note, the City is not arguing that total penalty awards under the PRA must be perfectly proportionate to the culpable conduct at issue or culpability in related jurisdictions. Nor is the City arguing that PRA penalties can never impose a greater burden on smaller jurisdictions than is imposed are larger jurisdictions. Rather, the City is arguing that the disparities in the preliminary penalty determination are so excessive that they are arbitrary and cannot be justified as necessary to serve as deterrence. The City is therefore arguing the PRA should be interpreted in a manner

that allows a court to avoid these gross disparities by adequately accounting for the high number of daily penalties and Mesa's small size and resources. Added to this fact is that no one would argue that a penalty this size is necessary to serve as deterrence, particularly in light of cases like *Yousoufian* and *Adams*, where courts have held that comparatively much smaller penalties have been found to be adequate.

Finally, when considering deterrence, it is appropriate to consider the deterrence effect on other agencies. If the only issue was the City of Mesa, the City's actions since this lawsuit in obtaining training and avoiding lawsuits demonstrates that no additional deterrence is needed.[67] But penalty awards also help motivate other agencies.

4. The Trial Court Properly Considered the Number of Daily Penalty Days When Setting Penalty Amounts

The trial court also properly considered the fact that the number of daily penalty awards at issue – 23,117 – artificially inflates the total penalty award. In its 2004 decision in the *Yousoufian* case, the Supreme Court acknowledged that the number of penalty days is a relevant consideration when setting penalties.[68] The Court went on to suggest that a trial court should also consider how multiple requests could artificially inflate the number of penalty days. *Yousoufian 2004*, 152 Wn.2d at 436 n.10.

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[67] *See supra* notes 11-12 and accompanying text

[68] *Yousoufian 2004*, 152 Wn.2d at 435-36 (rejecting per-record requirement because the purposes of the PRA are "better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiffs' request. Indeed, it seems unlikely that the legislature intended to authorize a penalty that Yousoufian once estimated at between $1,534,855 and $30,697,100, considering that the county did not act in bad faith.").

While the interaction between the number of daily penalties and the daily penalty rate was not expressly addressed by the Supreme Court in its 16 *Yousoufian* factors, the Court's silence on this issue is itself significant. This is because in its recalled 2009 decision, the majority decision expressly rejected the consideration of the number of penalty days as a justification for reducing the penalty rate.[69] The decision by the new majority in *Yousoufian 2010* to remove this prohibition on the consideration of the number of day demonstrates that the Supreme Court determined that the number of penalty days was a legitimate consideration.

This conclusion is further supported by the Supreme Court's decision in *Wade's Eastside Gun Shop*. That case involved the largest penalty award in a reported decision based on daily penalty rates that never exceed $5-per-day. *See Wade's*, 185 Wn.2d 270. Presumably the massive total penalty award is based on egregious misconduct – otherwise it would be irrational. The only way a minimal daily penalty rate can be justified in an egregious case is to find that the number of daily penalties at issue justified the reduction of the daily penalty rate.

In summary, after making a preliminary penalty determination, the trial court in this case properly made an across-the-board reduction of the penalty award, taking into consideration the issue of deterrence and Mesa's small size, and the number of penalty days at issue. The Court should

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[69] *See Yousoufian v. Officer of Ron Sims*, 165 Wn.2d 439, 461 n.13, 200 P.2d 322 (2009) ("*Yousoufian 2009*"); *see also id.* at 469 (Owens, J., dissenting) (emphasizing a trial court's discretion to consider "the number of penalty days and the level of culpability at different points in the penalty period").

therefore reject the Zinks' attempt to have the preliminary award entered in place of the reduced award.

C. The Trial Court Erred When It Failed to Further Reduce the Award (*First Issue on Cross Appeal*)

While the trial court had the discretion to make an across-the-board reduction of its preliminary penalty award, it still abused its discretion when it only reduced that award to $175,000, which still exceeds the City's annual general fund unrestricted tax revenue for all of 2015. A penalty is sufficient to serve as a deterrent when the penalty exceeds the amount the agency would need to spend on compliance.[70] A penalty that greatly exceeds that amount is therefore wasteful. A penalty that exceeds an agency's available revenue is by definition more than an amount needed to deter future violations because the agency could not spend more than 100% of its budget on PRA compliance. Moreover, best practices suggests an agency should spend significantly less than 1% of its available revenue on PRA compliance.[71] Thus it should not be a surprise that, with the exception of the decision in *Wade's Eastside Gunshop*, no PRA penalty recorded in a published decision has ever exceeded 1% of an agency's general fund budget, and the award in *Wade's* was only 2.1%.

Finally, no court would ever impose a PRA penalty that equaled 100% of an agency's budget or amounted to $350 per resident on

[70] See supra notes 1 & 4.

[71] CP 257-59.

substantially larger jurisdiction such as the City of Marysville or King County.

The trial court therefore should have reduced the total penalty award by a substantially greater amount, so that on average the penalty for each violation did not exceed 1% of the City's annual general fund unrestricted revenue. Here, this would provide for a total penalty award of approximately $58,000, or $116 per resident. This reduced penalty award does not give Mesa a "pass" or otherwise minimalize its violation of the RPA. Rather, on a per resident basis, this would be the equivalent of imposing a $224 million penalty on King County.

1. No PRA Penalty Has Ever Exceed 3% of an agency's annual general fund budget

As noted, the only PRA penalty recorded in a published decision that exceeds 1% of an agency's annual general fund budget is the penalty in *Wade's* and that penalty was 2.1%. Here is a summary of the published decisions

Case[72]	Penalty	General Fund Budget
Yousoufian v. Office of Ron Sims	$371,340	$3.1 billion[73]
Cedar Grove v. City of Marysville	$143,740	$42.2 million
Lindell v. City of Mercer Island	$90,560	$22.775 million
Bricker v. Dep't of L&I	$29,445	$22.224 million
Adams v. DOC	$24,535	$1.6 billion
Wade's v. Dep't of L&I	$502,827	$22.224 million
West v. Thurston County	$16,020	$81 million
Sanders v. State	$18,112	$4 million
Kitsap Cy. Pros. Att'ys Guild v. Kitsap Cy.	$845	$80 Million
ACLU v. Blaine School District	$5770	$5 million (est.)
Lindberg v. Kitsap County	$500 (est.)	$39 million (est.)

While some of the violations at issue in this case were egregious, penalties in other cases that involved bad faith or otherwise egregious conduct still have not exceeded the 1% threshold. The trial court should have used the 1% as a benchmark for setting its penalties.

2. No Court would impose a comparable penalty on a larger jurisdiction

Nothing in the PRA supports the idea that persons who live in small jurisdictions like Mesa should be punished at a significantly greater rate than persons who live in large jurisdictions. Consider King County and Marysville. Both jurisdictions were found to have committed egregious violations of the PRA. Yousoufian 2010, 168 Wn.2d 444; *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249

[72] The penalty amounts are taken from the appellate decisions. The budget amounts are supported by CP2 at 107-12 and CP2 at 242-56.

[71] This number reflects the county's entire budget, rather than the general fund budget. But it can be assumed the general fund portion exceeded $38 million.

(2015). If those violations were punished at the same rate as the current penalty on Mesa – $350 per resident – the penalties would amount to $675,000,000 for King County[74] and $21,000,000 for Marysville.[75] Instead, the penalty for King County in *Yousoufian* amounted to approximately $0.20 per resident. And the penalty for Marysville in *Cedar Grove* amounted to approximately $2.40 per resident.

While it can be argued that Mesa's violations were more egregious than the violations in *Yousoufian* and *Cedar Grove*, Mesa's violations were not egregious enough to justify such a massive disparity.

If penalty awards were restricted to one daily penalty per request, it would be nearly impossible for a large jurisdiction to face a multi-million dollar penalty award that would reach the magnitude of the penalty Mesa faces. But after the Supreme Court's ruling in *Wade's* permitting penalties to be set per page, the threat of such massive penalties are now quite realistic.[76] Given this threat, it is especially important for the Court to place some upper limits on what qualifies as a reasonable penalty. Otherwise, the threat of massive PRA penalties becomes leverage for persons to extract taxpayer dollars out of jurisdictions who have already suffered from employee misconduct. The 1%-per-violation cap that the City proposes serves that role – no jurisdiction can ignore the threat of such a massive

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[74] As noted, King County's population is 1,931,281. See supra note 7.

[75] Marysville's population in 2010 was 60,020. See Wikipedia, "Marysville, Washington" (available at https://en.wikipedia.org/wiki/Marysville,_Washington) (last visited 6/25/17).

[76] *See Wade's*, 185 Wn.2d 270 (5,431 pages of records withheld for 231 days, allowing for maximum penalty of $125,456,100).

penalty. Marysville would not ignore a $420,000 any more than King County could ignore a $30,000,000 penalty.

PRA penalties are not paid by the bad actors – they are paid by the taxpayers. PRA penalty awards should not be set at rates that cause the very waste the PRA was meant to help prevent. And taxpayers who live in small jurisdictions should not be required to shoulder massive penalty awards that a court would never impose on the taxpayers in larger jurisdictions.

Moreover, a massive award like the one imposed below cannot be justified by the deterrent goals of PRA penalties. Thus, the Court should affirm the trial court's discretion to make across-the-board reductions to serve deterrence but rule that a greater reduction was warranted here. Thus, the Court should further reduce the penalty award so that it does not exceed 1% per violation of the City's annual general fund unrestricted tax revenue – here approximately $58,000.

D. The Trial Court Erred in Increasing the Penalty Award by 1/3 based on an Erroneous Interpretation of the MRSC Memo[77]

As noted in the background section, five of the PRA violations at issue involved the redaction of contact/identifying information in five groups of documents:

- violation 6 (21 Code Violation files);
- violation 8 (Resignation letters of Murphy and Erickson);
- violation 15 (18 residential files);
- violation 16 (11 residential files); and
- violation 22 (Sharp Complaint)

[77] The Court only needs to reach these arguments if it rejects the City's proposed 1% per violation cap.

While the trial court originally found that these redactions were not made in bad faith and therefore set penalties at the lowest preliminary rate used by the trial court in the primary penalty period, the trial court subsequently quadrupled the penalty rate after June 23, 2003, which was the date the City received a memorandum from MRSC that addressed the redaction of contact information in an attorney invoice. CP 1062-63; Appendix B. Because the City withheld the unredacted records until November 7, 2008, the increased penalty was apply for a total of 5650 days and increased the total penalty award by 1/3.

The trial court's findings that the MRSC memo should have put the City on notice that its redactions were erroneous is not supported by the records. Moreover, even if the findings were correct, the trial court erred when it increases the penalties to such a degree that it increased the total penalty award by 1/3 based on this memo.

1. Factually, the MRSC Did Not Put the City on Notice Its Redactions Were Incorrect

None of the records at issue in these five violations were attorney invoices, so the MRSC memo did not directly address the redactions in the five violations. The memo made the following statements regarding the redaction of addresses:

- "My basic response to this issue is that there is no exemption from public disclosure that applies to names and/or addresses of private citizens in this context."
- "There is no exemption in [RCW 42.56.210 et seq.] applicable to a city that specifically exempts names of individuals except for

[RCW 42.56.240(2) (witnesses and complainants) and 42.56.240(1) for privacy)] ..."

- "As to addresses, the only public disclosure exemption that applies to addresses of citizens in [RCW 42.56.330], which exempts [addresses of utility customers]...."
- "Note that , for public employees, there is an exemption in [RCW 42.56.250(3)] for [employee addresses]. ...."
- "So, in sum, there is no exemption from public disclosure that authorizes the deletion of names and/or addresses from the records requested [attorney fee invoices] with respect to this public disclosure request."[78]

The exemptions that permit the redaction of contact information noted by MRSC are the exact exemptions the City had relied upon for redaction the documents at issue.

The trial court found that this memo was sufficient to put the City on notice that its redactions in the five violations were erroneous. The trial court explained its reasoning for its ruling at the June 29 hearing:

> But two things are clear to me. That, one, if the staff -- the memo referred only to residential addresses, and P.O. boxes would not be included in that. Number two, that memo pointed out sufficient number of very specific and erroneous assertions of the exemption and redactions that it should have caused the city to reexamine this whole area of the redaction of addresses. And had it done so, it would have found all of its errors. And ultimately we know that the redactions of all of these addresses were in error. And so it's -- I'm going stand by my original ruling, because it was part of a pattern of stubbornness on the part of the city, even faced with that memo to not go back and reexamine the whole thing. So it was a more global view from my point of view rather than on each individual type of exemption.

RP (6/29/16) at 33:16-34:4.

[78] CP 1062-62; Appendix B.

The facts before the Court do not support the Court's decision to increase the penalty rate on June 25, 2003 from $5 per day to $20 per day for five of the violations:

The June 23 MRSC Memo purports to deal with a narrow question regarding names and addresses on attorney invoices. None of the records redacted in Violations 6, 8, 15, 16 and 22 were invoices. While the memo does note that there is no general exemption for names and addresses, the memo would not have suggested to Mesa that the exemptions it asserted were erroneous because the memo goes on to identify specific exemptions that do allow for exemptions for names and addresses in certain situations. Those exemptions happened to be the exact exemptions the City had relied upon and/or that apply to the records at issue in these five violations.

First, nothing in the MRSC memo could suggest that the City's redactions of the addresses to Councilmembers Murphy and Erickson (violation 8) were improper because they were not – the addresses of employees and elected officials could have been redacted pursuant to former RCW 42.17.310(1)(u), now codified at RCW 42.56.250(3). The MRSC memo expressly identifies this exemption and therefore did not advise the City that its redactions were improper.[79]

[79] While the trial court states that this exemption does not apply to P.O. boxes, that statement is irrelevant. First, neither the statute nor the case law distinguishes between P.O. boxes and actual addresses. Second, the issue is not whether the addresses were in fact exempt – the city has conceded the violations. Instead, the issue is whether the city was unreasonable in not reconsidering its prior redactions based on the MRSC memo. Nothing in that memo suggests PO boxes would be treated differently than actual addresses.

Second, nothing in the memo would make the City reconsider its redactions for Violations 6, 15 and 16, because the City made those redactions based on a misunderstanding regarding the scope of the exemption for utility customers (former RCW 42.17.310(1)(v), now codified at RCW 42.56.330(2)) and the MRSC memo specifically identifies that exemption as well.

Finally, for violation 22, where the City redacted the identifying information of a resident who filed a complaint with the City, nothing in the MRSC memo advises that this redaction was incorrect. First, because the complainant was a resident and thus a utility customer, the same justification that applied to Violations 6, 15 and 16 also apply to his violation. Moreover, the memo expressly identified two exemptions that allow for the redaction of complainant's identifying information in investigative records. *See* former RCW 42.17.310(1)(d) & (e), now codified at RCW 42.56.240(1) & (2). Code violation investigations qualify as investigative records. *Wade's*, 185 Wn.2d at 283. Thus, while this was a complaint about the code inspector, it would not have been unreasonable for the City to read the MRSC memo to support its redactions of the complainant's identifying information.

In summary, nothing in the MRSC memo would have advised the City that its redactions were incorrect because the memo specifically identifies the exemptions that the City was relying on as valid exemptions. If anything, the MRSC memo would have re-enforced the city's decisions to make its redactions. Accordingly, there is no factual basis in the record

to support the Court's conclusion that this memo advised the City its redactions were erroneous.

2. Legally, It Was an Abuse of Discretion to Find That the City's Reaction to the MRSC Memo Justified Imposing a 1/3 Increase in the Total Penalty Award

Even if the trial court's finding that the MRSC memo was sufficient to put the City on notice that its redactions were erroneous, that fact does not justify a 1/3 increase in the total penalty award. This dramatic increase, of course, was largely a result of the number of penalty days at issue, but the trial court should have taken this into account when imposing an increased rate. It was arbitrary for the court to increase the daily penalty rate by 300% without considering the cumulative effect of that increase. *See Sargent v. City of Seattle*, 179 Wn.2d 376, 397, 314 P.3d 1093 (2013) (reversing court's decision to increase penalty rate based on changed circumstance as arbitrary). Even if some minor increase in the penalty rate was warranted, the trial court should have taken into account the number of penalty days at issue and made a much smaller increase, such as $1 per day for each violation. That still would have resulted in a $5,650 dollars, which is proportionally a larger penalty than the penalty imposed in *Wade's*,[80] and is sufficient to punish the wrongful withholding.

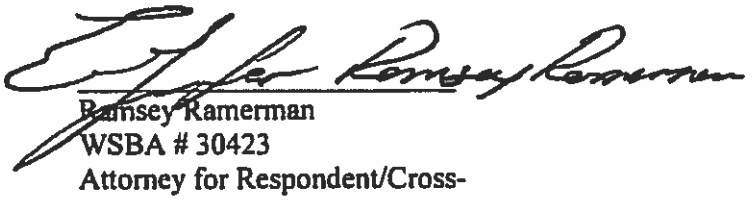
VI. CONCLUSION

For the above stated reasons, the City asks the Court to reject the Zinks' claim and reduce the total penalty award to approximately $58,000.

[80] This would be 3.2% of the Mesa's annual general fund unrestricted tax revenue. The award in *Wade's* was 2.1% of L&I's general fund budget.

RESPECTFULLY SUBMITTED this 30th day of June 2017.

RAMERMAN LAW OFFICE PLLC



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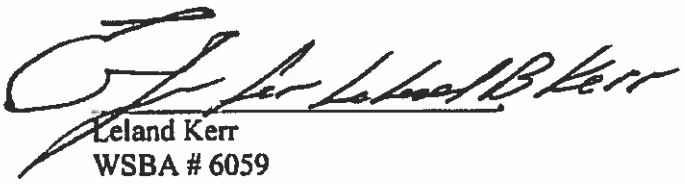

Leland Kerr
WSBA # 6059
Attorney for Respondent Cross-Appellant City of Mesa

Appendix A (preliminary penalty award) CP 2471

Violation No.	Description	Primary Period Penalty Days	Primary Period Penalty Rate ($/day)	Primary Period Penalty	Secondary Period Penalty Days	Secondary Period Penalty Rate ($/day)	Secondary Period Penalty	Tertiary Period Penalty Days	Tertiary Period Penalty Rate ($/day)	Tertiary Period Penalty	Quaternary Period Penalty Days	Quaternary Period Penalty Rate ($/day)	Quaternary Period Penalty	Total Penalty for Violation	Total Penalty Days
1	Complaint + Joint 10/31 Powell	51	$100	$5,100										$5,100	51
2	Clerk's Notes	944	$10	$9,440	47	$1	$47							$9,507	991
3	BOA Minutes and Rules	250	$100	$25,000										$25,000	250
4	BOA Tape	42	$100	$2,800										$2,800	28
5	21 Code Violation Files - Delay	42	$10	$420										$420	42
6	21 Code Violation Files - Redaction	131	$5	$655	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$24,087	2093
7	Ordinance 81-05	46	$5	$230										$230	46
8	Resignation Letters Marquis & Erickson	167	$5	$835	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$24,267	2179
9	MISC Memos	1271	$20	$25,420	812	$1	$812							$26,232	2083
10	BOA Rules	2	$45	$130										$130	2
11	BOA Rules	9	$45	$585										$585	9
12	Teresa Stanbridge Timecard	1243	$20	$24,860	812	$1	$812							$25,672	2055
13	Water Meter Reading	911	$45	$21,375										$21,375	911
14	Phone/Fax Log	1236	$20	$24,600	812	$1	$812							$25,412	2048
15	18 Residential Files	100	$5	$500	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$23,912	2048
16	11 Residential Files	93	$5	$465	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$23,917	2053
17	File of Requests, Delays, Denials, Vio. #1	1	$20	$20										$20	1
18	File of Requests, Delays, Denials, Vio. #2	42	$20	$840										$840	42
19	BOA Signed Minutes	4	$5	$20										$20	4
20	Council Minutes (2/13/02 & 3/4/03)	4	$20	$80										$80	4
21	Resignation Letter	4	$20	$80	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$22,917	2053
22	Sharp Complaint	97	$5	$485	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$23,917	2053
23	Code Scott Reply	76	$20	$1,520	649	$20	$13,780	812	$1	$812	441	$20	$8,820	$24,952	2018
24	April 30 Council Packet	50	$20	$1,000										$1,000	50
25	April 30 Vouchers	50	$20	$1,000										$1,000	50
26	Complaint Against Code	47	$10	$470										$470	47
27	Minute Book	49	$45	$1,725										$1,725	49
28	Clerk's Notes 2	760	$10	$7,600	47	$1	$47							$7,647	807
29	Council Minutes	43	$30	$1,290										$1,290	43
30	Maintenance Logs	754	$60	$45,240	117	$1	$117							$45,357	871
31	Resolution 2003-01	19	$30	$1,170										$1,170	19
32	Council Meeting Tape	39	$30	$1,170										$1,170	39
33	Draft Ord Ordinance	39	$30	$1,170										$1,170	39
TOTALS				$1,009,645			$45,987			$4,062			$12,520	$1,072,214	21817

Appendix B MRSC Memo (CP 1062-63)

TEL INQ NO	03-3070
Y/N	N
CITY/COUNTY	MI SA
DATE	6/23/03
REC	RRM
INQUIRER	TERI STANDRIDGE
TITLE	CLERK-TREASURER
FC	G 5 9500
RE	Disclosure of names and/or addresses of people identified in city attorney invoices and in invoices from company with whom city contracts for building department services

* * * * *

I e-mailed the following reply

This is to confirm what I stated to you over the phone yesterday concern the disclosure of names and/or addresses of private citizens contained in a public disclosure request for city attorney invoices and for invoices from firm with which city contracts for building department services. My basic response to this issue is that there is no exemption from public disclosure that applies to the names and/or addresses of private citizens in this context.

Public records must be disclosed upon request, unless a statutory exemption from disclosure applies. RCW 42.17.260(1). The general statute identifying most exemptions from public disclosure is RCW 42.17.310(1). There is no exemption in RCW 42.17.310(1) applicable to a city that specifically exempts names of individuals, except for RCW 42.17.310(1)(c), which exempts "Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the public disclosure commission, if disclosure would endanger any person's life, physical safety, or property." Also, there may be instances where, for example, names of witnesses may be deleted from investigative records, under RCW 42.17.310(1)(d), to protect their "right to privacy." (RCW 42.17.255 states that a person's right to privacy is considered violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.")

There is in RCW 42.17.260(9) a prohibition on disclosure of "lists of individuals requested for commercial purposes," but that provision does not apply to this request for disclosure.

As to addresses, the only public disclosure exemption that applies to addresses of citizens is RCW 42.17.310(1)(v), which exempts "residential addresses and residential telephone numbers of the customers of a public utility contained in the records or lists held by the public utility of which they are customers." That exemption does not apply here. (Note that, for public employees, there is an exemption in RCW 42.17.310(1)(u) for "residential addresses or residential telephone

numbers of employees or volunteers of a public agency which are held by any public agency in personnel records, public employment related records or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency.")

So in sum, there is no exemption from public disclosure that authorizes the deletion of names and/or addresses from the records requested with respect to this public disclosure request.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of August, 2017, I caused to be served a true and correct copy of the foregoing OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT (REVISED) to the following:

_____ INTER-CITY	Donna Zink
_____ U.S. MAIL	dlczink@outlook.com
XXXX E-MAIL	
_____ INTER-CITY	Jeff Zink
_____ U.S. MAIL	jeffzink@outlook.com
XXXX E-MAIL	

Sherrie Ashley

Sherrie Ashley

KERR LAW GROUP

August 03, 2017 - 9:42 AM

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